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I. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court committed error when it dismissed the Petition to Partition under Lewis County Superior Court Cause Number 12-2-01220-1 after Ms. Van Ginneken rested her case, ruling the agreed Property Settlement Agreement dated June 10, 2008 was void due to the court's failure to dispose of community property pursuant to RCW 26.09.080, and citing *Shaffer v. Shaffer*, 43 Wn. 2d. 629, 262 P.2d 763 (1953) and *Bernier v. Bernier*, 44 Wn.2d 447, 267 P.2d 1066 (1954) to support this ruling.

B. Issues Pertaining to Assignment of Error.

1. Do parties to a dissolution action have the right to voluntarily contract via a Property Settlement Agreement to dispose of property?

2. Is RCW 26.09.080 satisfied by the entry of a Property Settlement Agreement that requires the real property to be transferred to the parties as Joint Tenants with Right of Survivorship?

3. Does the conveyance of property as a condition of the Property Settlement Agreement constitute the disposal of property?

II. STATEMENT OF THE CASE

A. Statement of Facts.

The Appellant, Marinus Van Ginneken, (hereafter Marinus) and Plaintiff, Alexandrina Van Ginneken, (hereafter Ms. Van Ginneken) were married on November 8, 1961. (CP 2). The parties separated on December 15, 2007 after forty-six (46) years of marriage. (CP 2). The parties negotiated a property settlement agreement which was filed on June 11, 2008. (CP 2). One of the conditions of the property settlement agreement was to convey the real property from the parties as tenants in common to be held by the parties as joint tenants with right of survivorship. (CP 18). The fully executed Property Settlement Agreement was filed on June 11, 2008. (CP 2). The parties' marriage was dissolved by way of Decree of Dissolution on June 20, 2008. (CP 2). The Quit Claim Deed conveying the property to the parties as joint tenants with right of survivorship was recorded on June 27, 2008. (CP 18).

The parties resided together following the entry of the Decree of Dissolution until December 2008. (CP 10). During cohabitation, the parties shared all expenses relating to the family home. (CP 10). Marinus was forcibly removed from the home in December 2008. (CP 10). Marinus was forced to find alternative housing and was forced to incur the attendant financial obligations of those arrangements. (CP 10).

The Property Settlement Agreement states the parties are to share equally “one-half of all debt related to the family home located at 428 Manners Road, Rochester, WA 98579” including the mortgage, taxes and insurance, repairs, and any other reasonable debts related to ownership of said property. (CP 2).

The Property Settlement Agreement provides that the husband and wife shall have:

Joint tenancy with right of survivorship interest in the family home located at 428 Manners Road, Rochester, WA 98579, and legal description attached as Exhibit A hereto, with joint equal responsibility of any underlying debt and expenses thereon, including, but not limited to, mortgage, property tax, and insurance, pursuant to Section III below. (CP 2).

The parties maintained joint banking accounts from June 11, 2008 until approximately September 2011. (CP 10). Ms. Van Ginneken had access to the accounts and deposited money into the accounts and withdrew money from the accounts. (RP at 173). The parties both had a Dutch Pension, Canadian Pension and Social Security deposited into the joint accounts until September 2011. (CP 10). The joint accounts were used to satisfy the debts and obligations on the family home at 428 Manners Road, including the mortgage, taxes and insurance, repairs and other debts reasonably related to ownership of said property. (CP 10).

In September 2011, Ms. Van Ginneken established a new bank account and contacted the Canadian government to have her Canadian pension diverted to the newly established account. (RP at 71-72).

In September 2011, Ms. Van Ginneken contacted the United States government to have her social security diverted to the new account. (RP at Page 71-72).

In February 2013, Ms. Van Ginneken contacted the Dutch government and had her Dutch Pension diverted to her new account. (RP at 71-72).

Marinus paid all expenses and costs associated with the family home from September 2011 to February 2013 without any Canadian Pension or Social Security contribution to the account from Ms. Van Ginneken. (CP 10).

Marinus paid all expenses and costs associated with the family home from February 2013 to December 2013 without any Canadian Pension, Social Security or Dutch Pension contribution to the account from Ms. Van Ginneken. (CP 10).

Marinus contributed more income to the joint accounts than Ms. Van Ginneken. (CP 10). Marinus' contributions satisfied greater than fifty (50%) percent of the expenses related to the family home. (CP 10). Ms. Van Ginneken filed the Petition to Partition action to enforce the Property

Settlement Agreement. (CP 2). Marinus responded to the petition with a claim for offset. (CP 5).

B. Procedural History.

On December 14, 2007, Marinus filed a Petition to dissolve his marriage with Ms. Van Ginneken under Lewis County Superior Court Cause No. 07-3-00472-8.

On June 11, 2008, the parties filed the Property Settlement Agreement under Lewis County Superior Court Cause No. 07-3-00472-8.

On June 20, 2008, the parties dissolved their marriage via an agreed Decree of Dissolution in Lewis County Superior Court Cause No. 07-3-00472-8.

On June 26, 2008, the Quit Claim Deed dated June 10, 2008 was recorded under Lewis County Auditor Number 3308911.

On October 12, 2012, Ms. Van Ginneken filed a Complaint for Partition of the family home and to enforce the Property Settlement Agreement. This cause of action was filed under new Lewis County Superior Court Cause No 12-2-01220-1 rather than under the original cause number. (CP 2).

On November 2, 2012, Marinus answered the complaint and filed counter claims for an offset. (CP 5).

On May 22, 2013, Ms. Van Ginneken answered the counterclaims denying any offsets were owed. (CP 6).

On October 3, 2013, a scheduled two-day trial was commenced. After Ms. Van Ginneken rested her case, Honorable Lewis County Superior Court Judge Nelson E. Hunt dismissed the case sua sponte from the bench.¹ The court found the parties had failed to dispose of their property, making the Property Settlement Agreement “completely void.” (RP at 132).

On October 18, 2013, an Order of Dismissal was entered by Judge Hunt. (CP 16).

On October 22, 2013, Marinus filed a Motion for Reconsideration and Memorandum of Law Re: Motion for Reconsideration. (CP 17-18).

On October 28, 2013, without a hearing or response from Ms. Van Ginneken, Judge Hunt denied Marinus’ Motion for Reconsideration stating “the real property division was not properly determined by creating a joint tenancy with the right of survivorship and that there are significant questions regarding the equitable division of the property division. . . .” (CP 19).

¹ It is still under what authority, aside from the plenary power of the Superior Court, the case was dismissed. Judge Hunt did not cite the authority and there does not appear to be authority to dismiss pursuant to CR 41 or the General Rules.

On October 30, 2013, Ms. Van Ginneken moved the Lewis County Superior Court to vacate the Property Settlement Agreement under Lewis County Superior Court Cause No. 07-3-00472-8.

On November 13, 2013, Marinus filed a Notice of Appeal of Judge Nelson E. Hunt's Order dismissing Ms. Van Ginneken's Petition for Partition action under Lewis County Superior Court Cause No. 12-2-01220-1.

III. ARGUMENT

1. Do parties to a dissolution action have the right to voluntarily contract via a Property Settlement Agreement to dispose of property?

Trial courts have broad discretion in the distribution of property and liabilities in marriage dissolution proceedings. *Brewer v. Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). Settlement agreements are governed by general principles of contract law. *Lavigne v. Green*, 106 Wn.App. 12, 20, 23 P.3d 515 (2001). The adoption of RCW 26.09.070 and RCW 26.09.080 in the 1973 Dissolution Act, Laws of 1973, 1st Ex. Sess., Ch. 157, departed from the former rule, RCW 26.08.110 (Laws of 1949, Ch. 215, § 11, p. 710), cited in *Bernier*, that allowed a judge to give "slight deference" to separation agreements between divorcing parties. *In re Marriage of Shaffer*, 47 Wn.App. 189, 733 P.2d 1013 (1987).

Under the current statute, RCW 26.09.070(3), “amicable agreements are preferred to adversarial resolution of property ... questions,’ and the separation contract is, therefore, binding on the parties unless the trial court finds it “unfair” at the time of execution.” *Little v. Little*, 96 Wn. 2d 183, 193, 634 P.2d 498 (1981). The “time of execution” was June 2008; more than five (5) years ago, and Ms. Van Ginneken, unlike in *Little*, has only sought to enforce the Agreement through the Petition to Partition and never challenged its fairness.

Although RCW 26.09.070 and RCW 26.09.080 are different statutory provisions, RCW 26.09.070 governing “separation contracts” and RCW 26.09.080 governing “disposition of property factors,” the statutes should be construed as a whole, giving effect to all the language used; especially where the provisions can be harmonized. “A principle of statutory construction is to avoid interpreting statutes to create conflicts between different provisions, so as to achieve a harmonious statutory scheme.” *Am. Legion Post # 149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008). *Scheib v. Crosby*, 160 Wn. App. 345, 350, 249 P.3d 184, 186 (2011). The encouragement of voluntary agreements are promoted and supported throughout RCW 26.09, including RCW 26.09.070 (Separation Contracts), RCW 26.09.015 (Mediation Proceedings), RCW 26.09.138 (Mandatory Assignment of Public

Retirement Benefits), RCW 26.09.184 (Permanent Parenting Plan), and RCW 26.09.187 (Criteria for Establishing Permanent Parenting Plan). Each provision of RCW 26.09 references agreements between the parties. “The entire sequence of statutes enacted by the same legislative authority, relating to the same subject matter, should be considered in placing a judicial construction upon any one of the acts.” *State ex rel. Washington Mut. Sav. Bank v. Bellingham*, 183 Wn. 415, 48 P.2d 609 (1935). *Little v. Little*, 96 Wn. 2d 183, 189, 634 P.2d 498, 502 (1981).

Unlike many cases like *Little* and *Bernier*, Ms. Van Ginneken never plead that the Property Settlement Agreement should be set aside or that the Agreement was unfair. (CP 2). Both parties have only sought to enforce the Agreement. *Id* The Agreement, entered into prior to the entry of the Decree of Dissolution, should be enforced because the parties, not the court, disposed of the property as they saw as fair and equitable.

The *Little* Court stated further,

At the end of the prescribed period, the party or parties become entitled to a decree. Presumably, if the parties have entered into a separation agreement as provided for and ****502** encouraged in RCW 26.09.070, the decree can be granted promptly, since the court has only a minimal role to play in settling the matter. However, if the parties have not reached agreement and a trial is required, it is more than likely that a further delay will be necessary, both for trial preparation and the obtaining of a trial date.

Little v. Little, 96 Wn.2d at 189, 634 P.2d at 501-02.

Property settlements are not presumptively fraudulent. *Jones v. Jones*, 56 Wn.2d 328, 353 P.2d 441 (1960). According to RCW 26.16.120,

Nothing contained in any of the provisions of this chapter or in any law of this state, shall prevent both spouses or both domestic partners from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by both spouses or both domestic partners by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner. Such agreement shall not derogate from the right of creditors; nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud or under some other recognized head of equity jurisdiction, at the suit of either party; nor prevent the application of laws governing the community property and inheritance rights of slayers or abusers under chapter 11.84 RCW. RCW 26.16.120.

Marinus and Ms. Van Ginneken not only signed the properly witnessed Property Settlement Agreement, but also signed the properly witnessed Quit Claim Deed. Unless the Agreement and Quit Claim Deed, which were signed on different days, are each found not to have been made in “good faith” they both should be enforced as both parties plead to the trial court in Ms. Van Ginneken’s Complaint, and Marinus’ Answer and Counterclaim. (CP 5) The issue of “good faith” was not plead. Both parties only

attempted to enforce the Agreement and calculate offsets following their agreement to sell the family home.

Ms. Van Ginneken's counsel clarified to Judge Hunt why they did not plead fairness and sought to enforce the Property Settlement Agreement; stating:

No, and I'll tell you why. Because basically we had two options here, and basically the reason that we present evidence as to unfairness or anything else in the putting together of this agreement and its effect is that the remedy being sought is offset, which is equitable, and the conduct of the party seeking equitable relief is always an issue for presentation of evidence. What we say is we want this money, and we want the property to be sold and divided. What Mr. Van Ginneken says is, "All that's fine and good, but in the end I'm not going to owe Mrs. Van Ginneken anything because there's this offset, and offset is an equitable remedy." So to explain the case better, yes, we could have gone back in, and one of our options was to go back into the case pursuant to CR 60(b), and sought relief to set aside or vacate the judgment and find all of that, including the property settlement agreement, to have been improperly put together, which would have required that we prove that our client was probably not competent, so our option was to seek partition. That's what we did. (RP at 12).

At trial, after Marinus' counsel objected to irrelevant questioning, the Court inquired of Ms. Van Ginneken's counsel "Can you please tell me what this has to do with enforcing the property settlement, please?" (RP at 25). Counsel for Ms. Van Ginneken responded, "It doesn't have to do with enforcing a property settlement agreement that we're asking to be enforced, so I think I'm following -- I'm trying to make sure that I'm not

being unresponsive, Your Honor, to your inquiry.” (RP at 25). Counsel for Ms. Van Ginneken eventually withdrew his line of questioning. (RP at 26).

Parties to a dissolution action have the right to contract for the disposition of property and are encouraged to seek voluntary agreements without the need for costly litigation. RCW 26.09.070. *Byrne v. Ackerslund*, 108 Wn. 2d 445, 739 P.2d 1138 (1987). Under the prior law cited by Judge Hunt, property settlement agreements were only adopted if the terms of the agreement were deemed fair and equitable. *State ex rel. Atkins v. Superior Court*, 1 Wn.2d 677, 97 P.2d 139 (1939); *Lee v. Lee*, 27 Wn.2d 389, 178 P.2d 296 (1947). After 1973, “amicable agreements” are preferred to adversarial resolution of property and separation agreements are binding upon the court unless it finds that the contract was unfair at the time of its execution. RCW 26.09.070(3). *Little v. Little*, 96 Wn. 2d at 192-93. There is no evidence that the agreement was unfair at the time of execution and there has been no argument or pleading filed in this case that would suggest such unfairness. The Property Settlement Agreement should be binding on the court.

2. Is RCW 26.09.080 satisfied by the entry of a Property Settlement Agreement that converts, via quit claim deed, ownership of real property from Tenants in Common to Joint Tenants with Right of Survivorship?

The trial court cited and relied upon two specific cases to support the dismissal of the case, reasoning that the court commissioner failed to dispose of the family home, and therefore the property settlement agreement was void. (RP at 132) First, the court relied upon *Shaffer v. Shaffer*, 43 Wn2d. 629, 262 P.2d 763 (1953). The *Shaffer* Court stated that:

The trial court has a wide discretion in this regard, but the result of the decree in the case at bar is to leave the Aloha street property the same as if it were community property of the parties which had not been before the court for disposition. They become tenants in common of any community property not disposed of by the decree. *Olsen v. Roberts*, Wn.1953, 259 P.2d 418, and cases cited. This was not a performance of the court's statutory duty. The wisdom of the legislative requirement is well illustrated by this case. Because of the inadequacies in the decree, future litigation, including a partition action, between the parties may be necessary. They should not be left with this prospect. They have a right to have their respective interests in their property after they are divorced, definitely and finally determined in the decree which divorces them.

Shaffer, 43 Wn. 2d at 630, 262 P.2d at 764.

That case is distinguishable. In the present case, the parties' assets were not left undisposed of after a trial as was the case in *Shaffer*, there was no trial. In the present case the parties not only signed a property settlement agreement, but also conveyed the property from its pre-decree status as

jointly owned as tenants in common, to joint tenants with right of survivorship. This was a specific provision in the property settlement agreement, much like any other conveyance of property might be negotiated as a term of an agreement in such circumstances. Furthermore, the Shaffer court stated:

Divorce is a statutory proceeding. The section pertinent in this case reads in part as follows: ‘*** **Upon the conclusion of a divorce *** trial**, the court must make and enter findings of fact and conclusions of law. . . and making such disposition of property of the parties, either community or separate, as shall appear just and equitable. . . . RCW 26.08.110, cf. Rem.Supp. 1949, §997-11, Laws of 1949, Chapter 215, § 11, p. 701.’ *Id.*, at 630. (Emphasis added)

Marinus and Ms. Van Ginneken voluntarily disposed of the property by entering into the property settlement agreement and Decree of Dissolution, signing a quit claim deed prior to the entry of the Decree and recording it after the entry of the Decree. (CP 17). The parties were advised of their rights to an attorney in the Property Settlement Agreement (CP 2); Ms. Van Ginneken had her daughter present as an advisor at the signing of the Property Settlement Agreement (RP at 94); all parties are attempting to enforce the agreement; and it has been more than five (5) years since the signing of the Agreement and Quit Claim Deed.

The property was disposed of as the parties had contemplated and the present case can be distinguished from *Shaffer v. Shaffer*. Again, the

parties in *Shaffer* were involuntarily left as tenants in common after a trial by the court.

The trial court also cited *Bernier v. Bernier*, 44 Wn.2d 447, 267 P.2d 1066 (1954) as a basis to dismiss the case after Ms. Van Ginneken rested. In *Bernier*, the court addressed two (2) properties: a home disposed of at trial and a grocery store disposed of by agreement in a property settlement agreement reached prior to trial. The *Bernier* case was also decided through trial and prior to the adoption of RCW 26.09.070 and RCW 26.09.080 in 1973. The trial judge in *Bernier* was asked to distribute a family home at trial under the authority RCW 26.08.110, a statute which has since been replaced. The trial court involuntarily awarded the family home to the parties as tenants in common. The appellate court held that this was error and not a full performance of the trial court's functions, which is to dispose of all property after trial. The trial court essentially left the parties in the same position they would have been without the trial. Conversely, the present case involved an agreed upon Property Settlement Agreement and agreed upon Quit Claim Deed. There was no trial and subsequent legislative enactments specifically support such an agreement. Further, the parties did, in fact, dispose of the property as specifically contemplated in the property settlement agreement. *Bernier* is not controlling on this point and has been superseded by statute.

The *Bernier* court also resolved the issue of the grocery store, stating:

While a property settlement agreement, fairly reached, should have great weight with the court in determining the property rights of the parties to a divorce action, it is not binding upon the court. The rule is well stated in *Lee v. Lee*, 1947, 27 Wn.2d 389, 400, 178 P.2d 296, 302: 'As a general rule, voluntary settlements of property rights are binding on the parties and will be upheld if they are fair and equitable, untainted with fraud, collusion, coercion, undue influence, or the like, although, in subsequent actions for divorce, such settlements or agreements are not binding on the court and may be disregarded if the court is satisfied that they are unfair, unjust, or do not constitute a proper division of the property. *Tausick v. Tausick*, 52 Wn. 301, 100 P. 757; *Malan v. Malan*, 148 Wn. 537, 269 P. 836; *State ex rel. Atkins v. Superior Court*, 1 Wn.2d 677, 97 P.2d 139; 27 C.J.S., Divorce, § 301, P. 1157.'

Bernier, 44 Wn. 2d at 450, 267 P.2d at 1067-68.

The issue of whether the agreement was fair and equitable was not before the court in the present case. In *Bernier*, the husband raised the issue of fairness in his answer. In contrast, Ms. Van Ginneken and Marinus are asking the court to enforce the agreement and the parties. Furthermore, court commissioner already determined the assets were distributed in a fair and equitable manner approximately five (5) years ago when the Property Settlement Agreement was signed, Decree entered, and quit claim deed recorded. Fairness was never an issue in the Complaint, Answer, Counterclaim or Answer to the Counterclaim.

Additionally, our courts have limited the reach of *Shaffer*. In *Byrne v. Ackerlund*, 108 Wn. 2d 445, 739 P.2d 1138 (1987), the Washington State Supreme Court, En Banc, expressed unwillingness to broaden *Shaffer* beyond its specific facts. The *Byrne* Court noted a significant factor in *Shaffer* that is not in the case at hand or in *Byrne*, stating:

Yet another factor distinguishes this case from *Shaffer*. In *Shaffer* the parties did not voluntarily agree to hold their interests as tenants in common; that disposition was chosen for them by the trial court. Here, by contrast, the parties entered into a voluntary and mutually beneficial arrangement.” *Byrne*, 108 Wn. 2d at 451, 739 P.2d at 1141.

Although *Byrne* involved a lien/title division, the court stated “applying *Shaffer* to this case would have dangerous implications. It would severely impede spouses' freedom to contract for mutually advantageous property settlements. . . .” See *High v. High*, 41 Wn.2d 811, 822, 252 P.2d 272 (1953). *Byrne*, 108 Wn. 2d at 450-51, 739 P.2d at 1141.

The *High* court also stated: The discretion accorded the trial court is a broad one. We will not reverse readily on appeal, absent a clear showing that the property division constituted an abuse of judicial discretion. *High v. High*, 41 Wn.2d 811, 820-21, 252 P.2d 272, 277 (1953). First, fairness was not plead; however, even if it had, there was not a clear showing of abuse by the court commissioner at the entry of the Property Settlement Agreement and Decree.

In the present case, like in *Byrne*, the parties determined that this arrangement may be “the only practical means of dividing that wealth without forcing sale of the property.” *Id* at 449. The *Byrne* Court further states

Much of the difficulty in this case stems from *Shaffer's* language that the respective property interests of the parties must be “definitely and finally determined”. This court has never clarified exactly what constitutes a definite and final determination. We believe that the *Shaffer* requirement is satisfied by a specific disposition of each asset which informs the parties of what is going to happen to the asset and upon what operative events, *e.g.*, that a set sum or formula of money will be paid upon the sale of certain property. The trial court is not required to do the impossible in attempting an exact determination of *all* aspects of one's interests. The Court of Appeals was concerned that *Byrne* will not know the exact value of her liens until there is a definite time for sale. But it is a common, and surely acceptable practice, for divorcing spouses to agree to divide the proceeds from the sale of certain property without knowing what the exact value will be at the time of sale. Property settlement agreements are to be examined by the trial court for general fairness, it is not necessary to set a fixed deadline and value for each item of disposition. We conclude that the dissolution decree at issue here was sufficiently final and definite in its disposition of the parties' property. (*internal citations omitted*)

Byrne, 108 Wn. 2d at 451-52, 739 P.2d at 1142

In the present case, the issue of a fair and equitable distribution was never an issue. The parties voluntarily resided together for almost six (6) months after the entry of the decree. The parties both agreed that they could live in the home and the parties were to share in the expenses through their

shared accounts. Marinus asked for offsets from the sale because the expenses were not paid 50/50.

Like in *Byrne*, the parties did dispose of their property in a fair and equitable manner via the Property Settlement Agreement and Quit Claim Deed. Although no specific date for sale of the family home was included in the Property Settlement Agreement, one was not required, according the court in *Byrne*. See also *In the matter of the Marriage of Sedlock*, 69 Wn.App. 484, 849 P.2d 1243 (1993). (Court did not err by involuntarily leaving parties as tenants in common of family home where ownership rights were fixed.)

The parties' intent was for each to receive a one-half interest in the property and be responsible for one-half of the expenses and debts on the family home. The parties contemplated the property was held as Tenants in Common and determined it was beneficial for the parties to hold the property as Joint Tenants with the Right of Survivorship and continue residing on the property together; especially considering their ages and health. The parties executed all documents necessary to dispose of the property.

The property was transferred via quit claim deed. (CP at 17).

When one spouse deeds a community interest in the property to the other, the property becomes the separate property of the grantee spouse unless there is clear and convincing evidence that

such was not the intention of the parties.” *In re Estate of Monighan*, 198 Wn. 253, 88 P.2d 403 (1939).

On June 10, 2008, the parties signed the quit claim deed “for and in consideration of marital distribution of property pursuant to a Decree of Dissolution” and the parties conveyed and quit claimed the property to each other “as joint tenants with right of survivorship.” (CP at 17). The quit claim deed was recorded on June 27, 2008. (CP 17).

A quitclaim deed conveys grantors' interest in, or title to, real property, and nothing more. *Muscatel v. Storey*, 56 Wn.2d 635, 354 P.2d 931(1960); *Ennis v. Ring*, 49 Wn.2d 284, 300 P.2d 773 (1956). A joint tenancy with right of survivorship is created pursuant to RCW 64.28.010, which states:

Whereas joint tenancy with right of survivorship permits property to pass to the survivor without the cost or delay of probate proceedings, there shall be a form of co-ownership of property, real and personal, known as joint tenancy. A joint tenancy shall have the incidents of survivorship and severability as at common law, including the unilateral right of each tenant to sever the joint tenancy. Joint tenancy shall be created only by written instrument, which instrument shall expressly declare the interest created to be a joint tenancy. It may be created by a single agreement, transfer, deed, will, or other instrument of conveyance, or by agreement, transfer, deed or other instrument from a sole owner to himself or herself and others, or from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from both spouses or both domestic partners, when holding title as community property, or otherwise, to themselves or to themselves and others, or to one of them and to another or others, or when granted or

devised to executors or trustees as joint tenants: PROVIDED, that such transfer shall not derogate from the rights of creditors. RCW 64.28.010.

The quit claim deed creating the joint tenancy with right of survivorship was recorded on June 28, 2008. Not only may the spouses hold property between themselves as joint tenants with right of survivorship, but they, as a community, may also be joint tenants with third persons. *Lyon v. Lyon*, 100 Wn.2d 409, 413, 670 P.2d 272, 274 (1983)(land); *In re Estate of Webb*, 49 Wn.2d 6, 12–13, 297 P.2d 948, 952 (1956)(bank account).

Instructive is Washington Practice on the subject of Joint Tenancy, which provides:

During most of Washington State's history, joint tenancy in real property was not allowed by statute. It was thought that joint tenancy, which, where allowed, usually existed between husband and wife, was inconsistent with community property. However, a series of statutes long allowed several kinds of joint bank accounts and joint United States savings bonds. In 1960, by Initiative Measure 208, the citizens of the state adopted what is now chapter 64.28 of the Revised Code of Washington, generally allowing joint tenancy, though leaving its definition to common law principles. 17 Wash. Prac.. Real Estate § 1.29 (2d ed.).

Joint tenancy does not appear to be a disfavored form of ownership, as it is allowed even among married parties. In the present case, the parties not only disposed of the property via the Property Settlement Agreement,

but disposed of the property by recording a quit claim deed to convert the property and put the world and creditors on notice of the change.

Community property not disposed of by decree is held by the parties as tenants in common. *In re Marriage of de Carteret*, 26 Wn.App. 907, 908, 615 P.2d 513 (1980). The Van Ginneken property was not held by the parties as tenants in common after dissolution, but as joint tenants with the right of survivorship pursuant to the Quit Claim Deed and Property Settlement Agreement.

“The court in the partition action is to determine the value of the accounts receivable [property] at the time of dissolution. Where property is held as tenants in common, our Supreme Court has held that the parties intended them to share the property equally, unless the court is shown otherwise. *Cummings v. Anderson*, 94 Wn.2d 135, 141, 614 P.2d 1283 (1980).” *In re Marriage of Monaghan*, 78 Wn. App. 918, 929, 899 P.2d 841, 847 (1995).

For more than six (6) months the parties continued to reside together after the entry of the decree. For more than five (5) years the parties held the property as joint tenants with the right of survivorship and Marinus paid all the expenses from their joint accounts while Ms. Van Ginneken continued to reside in the home. A partition action was brought by Ms. Van Ginneken to enforce the Property Settlement Agreement;

despite other options available to Ms. Van Ginneken. The ownership intent to hold the property jointly appears clear from the action of the Van Ginnekens at the formation of the Property Settlement Agreement, over the past five (5) years, as well as at trial.

IV. ATTORNEY FEES

Marinus should also be awarded attorney fees on appeal. Marinus is asking the court to reverse a decision that the Property Settlement Agreement and Quit Claim Deed did not dispose of the property of the parties after dissolution. An award of attorney fees on appeal is appropriate, and the award should be for the full amount of the fees and costs incurred by Marinus, if he prevails.

Numerous decisions have held that where a statute or contract allows for the recovery of attorney fees at the trial court level the appeal court has inherent authority to award attorney fees. *Standing Rock Homeowners Association v. Misich*, 106 Wn.App. 231, 247, 23 P.3d 520 (2001); *Brandt v. Impero*, 1 Wn.App. 678, 683, 463 P.2d 197 (1969). In the present case, the award of fees are authorized via the Property Settlement Agreement Section V(A), as well as RCW 26.09.140. Marinus is entitled under RAP 18.1 to an award of fees and costs on appeal.

V. CONCLUSION

Lewis County Superior Court Judge Nelson E. Hunt dismissed Ms. Van Ginneken's Petition for Partition trial after Ms. Van Ginneken's counsel rested. Judge Hunt cited two cases, *Shaffer* and *Bernier*, for the proposition that parties to a dissolution action may not contract and agree to convert their property from tenants in common to joint tenants with the right of survivorship through a property settlement agreement and quit claim deed. The cases cited by Judge Hunt pre-date the modern statute and case law that followed.

Marinus and Ms. Van Ginneken did voluntarily dispose of their property via the Property Settlement Agreement and Quit Claim Deed. The parties have a right to own their property together after a marriage is dissolved as joint tenants with the right of survivorship. Judge Hunt erred in finding the parties did not dispose of their property; making the Property Settlement Agreement void.

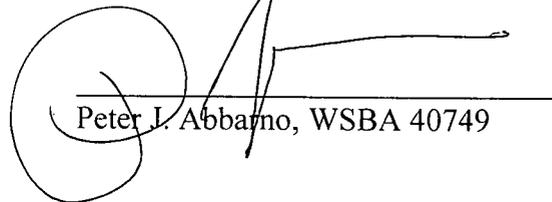
Judge Hunt erred in dismissing the case prior to Marinus presenting his case and evidence. Judge Hunt provided no authority for the dismissal, aside from believing the Property Settlement Agreement was void for want of disposal, (RP at 132) and wanting the case to be a one-day trial despite the fact it was set for a two day trial. (RP at 131). Marinus and Ms. Van Ginneken both desired the home be sold and the

proceeds shared. Ms. Van Ginneken wanted equalization payment to come from the sale of the home. Marinus wanted an offset.

The trial court's dismissal of the Petition after Ms. Van Ginneken rested her case at trial should be reversed. The Property Settlement Agreement and the Quit Claim Deed should be found to have disposed of the property. The case should be remanded so Marinus can present his case as to the value of the family home and offsets. The issues before the trial court should be limited to the enforcement of the Property Settlement Agreement, value of the home, and the relief sought by the parties.

DATED this 21 day of January 2014

OLSON ALTHAUSER
SAMUELSON & RAYAN, LLP
Attorneys for Marinus Van Ginneken



Peter J. Abbarno, WSBA 40749

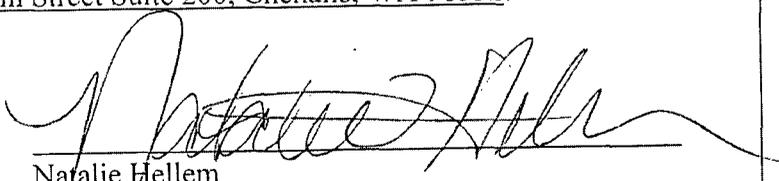
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ALEXANDRINA VAN GINNEKEN,)
Plaintiff) No: 45574-9-II
v.)
MARINUS VAN GINNEKEN,) AFFIDAVIT OF SERVICE
Appellant)

I, Natalie Hellem, hereby certify that on the 21st day of January 2014, at 4:45 p.m. personally served upon Mr. Dana Williams the opening Brief of Appellant, by delivering said documents to his office at Williams and Johnson, 57 W. Main Street Suite 200, Chehalis, WA 98532.

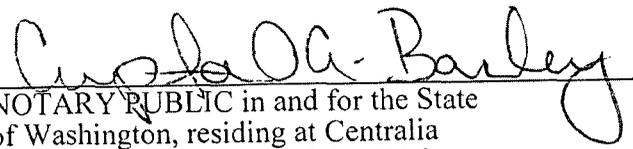
DATED this 21st day of January, 2014.



Natalie Hellem

SUBSCRIBED and SWORN to before me this 21st day of January, 2014.





NOTARY PUBLIC in and for the State
of Washington, residing at Centralia
My commission expires: 5/20/2016
Printed Name: CRYSTAL BAILEY